IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

LOWELL R. FISHER, D.O.

Plaintiff-Appellant.

-vs- Docket No. 126333

W.A. FOOTE MEMORIAL HOSPITAL, INC.,
A Michigan Corporation,

Defendant-Appellee.
_____/

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

This is an Appeal of an Order of the Court of Appeals, dated May 4, 2004, affirming a grant of Summary Disposition by the Circuit Court for the County of Jackson. Plaintiff-Appellant seeks Reversal of the Order of the Court of Appeals and Remand for further consideration of his Appeal in that Court.

Leave to Appeal was granted by the Supreme Court on January 13, 2005, and jurisdiction is therefore based on MCR 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does MCL 333.21513(e), prohibiting discrimination by a licensed hospital on the basis of, among other things, osteopathic licensure and training, create a private right of action in the victim of such discrimination?

Plaintiff-Appellant says, "Yes."

Defendant-Appellee would say, "No."

The Court of Appeals said, "No."

STATEMENT OF FACTS AND PROCEEDINGS

The sole question at issue here, on which this Court granted Leave to Appeal, is a purely legal one dealing with the effect of a statute. The particulars of the present case, therefore, are not strictly relevant, though the facts of this case – taking them, as we must at this stage of the proceeding, as Plaintiff alleges them – present a clear-cut case of discrimination on the basis of osteopathic training and licensure. If the statute creates a private cause of action, this is a case coming under it.

Plaintiff-Appellant LOWELL R. FISHER, D.O., is an osteopathic surgeon who has been licensed to practice for more than three decades, and he has never before been denied privileges at any hospital, of any school of practice. After many years of successful practice, he applied for staff privileges in surgery at Defendant-Appellee W. A. FOOTE MEMORIAL HOSPITAL in Jackson. At the time he applied for privileges, there were no osteopathic physicians holding privileges in Defendant's Department of Surgery. Defendant's Counsel declared before the Circuit Court, however, that two were appointed in the ensuing couple of years (Transcript of Hearing of September 13, 2002, p 10 ["T 10"]; Appellant's Appendix, p 28a). Defendant also submitted an affidavit of its legal director purporting to show that many osteopaths were on staff; these alleged statistics, however, did not relate to the time period in question nor to the Surgery Department specifically. Nevertheless, the Court ultimately considered the presence of osteopaths on Defendant's staff as definitive *proof* that no discrimination had been practiced.

Upon applying for privileges, Plaintiff was informed by a letter from David Eggert, M.D., Chair of the Surgery Department, dated October 10, 1995 (Court of Appeals Exhibit 1 ; Appellant's Appendix, p 53a), that he, Dr. Eggert, "[had] been asked to review [Plaintiff's] application at this time pending a resolution of some overall issues of the relative equivalency between the American Boards and the AOA-sponsored Boards." This latter was a reference to the American Osteopathic Association Boards; apparently, in October of 1995, the Hospital was not sure whether the training received by board-certified osteopathic surgeons was the equivalent of that received by allopathic surgeons certified by the Accreditation Council for Graduate Medical Education ("ACGME"). By its own admission, therefore, Defendant's Surgery Department was *studying* whether or not to accord the same weight and validity to osteopathic training and certification as to allopathic – despite the fact that the statute mandated that there be no discrimination between the two. Plaintiff nevertheless continued to cooperate with the credentialing process.

On October 25, 1995, the Board of Trustees of Defendant Hospital passed a joint policy on qualifications for medical staff appointments and clinical privileges (Court of Appeals Exhibit 2 ; Appellant's Appendix, p 55a). There, the Board of Trustees declared:

> The Medical Staff Bylaws, Departmental Rules and Regulations, and other Hospital policies outline certain threshold qualifications for the granting of Medical Staff appointment and clinical privileges at Foote Hospital. These qualifications were established by the Medical Staff of the Hospital and represent the benchmark standards that will be expected of, and will be applied to, all individuals who seek

to practice at the Hospital.

The "benchmark" standard for the Surgery Department to which this joint policy refers is the ACGME standard, which is *allopathic* board certification. The policy further provided that:

> Any such individual may request that an exception be made, and that a particular qualification be waived. In such a situation, however, the individual requesting the waiver bears the burden of demonstrating that his or her education, training, experience, and competence is equivalent to the qualification at issue. The Board may grant such waivers *in exceptional cases* after considering the findings of the Credentials Committee, Medical Executive Committee, or other committee designated by the Board, the specific qualifications of the individual in question, and what is in the best interests of the Hospital and the community served by the Hospital.
>
> * * *
>
> If the Board grants a waiver in a particular case, that waiver is in no way intended to set a precedent for any other physician or group of physicians.

(Emphasis added.) The policy, therefore, *on its face*, expressed a preference for allopathic board certification, which was accepted at face-value, over osteopathic, which could be accepted only upon a case-by-case showing of "exceptional" circumstances.

The requirement was clarified in a November 15, 1995, letter to Plaintiff from Kenneth Empey, Defendant's Vice-President for Legal Affairs and Risk Management (Court of Appeals Exhibit 3 ; Appellant's Appendix, p 56a).

> As you know, leadership at Foote Hospital has been discussing our Board Certification requirement in the variety of context, including requirements by particular departments and *only the American Boards are acceptable* (e.g., Department of Surgery). As a result of these discussions, the Medical Executive Committee and the Board of Trustees have jointly adopted a policy that establishes a waiver procedure, whereby individual applicants can request waiver of certain qualification requirements. A copy of that policy is enclosed for your review.
>
> Inasmuch as your individual case would require waiver of the American Board requirement for membership in the Department of Surgery, it would be necessary for you to submit a written request that your Osteopathic Board Certification/Board Eligibility be accepted *in lieu of the American Board requirement*.

(Emphasis added.) By its own admission, therefore, Defendant intended to treat Plaintiff's osteopathic board certification as less than the equivalent of allopathic certification, unless Plaintiff could demonstrate otherwise.

Despite the legal impropriety of the procedure, Plaintiff submitted a formal request for a waiver of the requirement (Court of Appeals Exhibit 4 ; Appellant's Appendix, p 57a).

In a letter on December 27, 1995 (Court of Appeals Exhibit 5 ; Appellant's Appendix, p 58a), however, Defendant informed Plaintiff that his request for a waiver had been denied, specifically because he had failed to prove that his certified osteopathic training was the equivalent of an allopathic certification.

> Upon the recommendation of the Medical Staff, the Board of Trustees at its December 20, 1995, meeting determined that your request for a waiver of the requirements of ACGME-

> approved training and American Board of Surgery certification should be denied. Therefore, you have not met the threshold tests for eligibility for Medical Staff membership.
>
> The reason for the denial was that based upon the information you had provided to date, the Board did not feel that you had established that your training was reasonably equivalent to the ACGME-approved training.

He was offered an opportunity, however, to provide supplementary material.

> You do have the option of providing supplemental information in an attempt to establish training program equivalency, if you so desire.

This is significant because, before the Circuit Court, Defendant's Counsel characterized Plaintiff's conduct as filing suit rather than providing requested information (T 9 ; Appellant's Appendix, p27a); in fact, no information was actually requested, only stated to be submissible at Plaintiff's option.

The Court should also note that, technically, Plaintiff was not "denied" privileges, but ruled ineligible to apply. This is because the denial of privileges is a reportable event under the Health Care Quality Improvement Act, 42 USC § 11133, and hospitals are therefore properly careful not to place a black mark on a doctor's record when the refusal to grant privileges is for a purely technical failing – such as an inability to present minimum credentials. This, however, undercuts Defendant's representations, throughout this litigation, that Plaintiff had been evaluated and found wanting because of deficiencies in his background; actually, he was never evaluated.

Defendant also argued below that the Surgery Department's requirements were not actually discriminatory because there was nothing to stop an osteopath from obtaining allopathic board certification. In fact, however, there was no actual evidence on the record that this was possible.

Suit was filed in September of 1997; Defendant's characterization below of Plaintiff's response as a rush to the courthouse was clearly mistaken. The case was stayed due to an attempted interlocutory appeal on a discovery issue for quite some time, but no attempt was made to have it dismissed for lack of progress. In August of 2002, Plaintiff moved to lift the stay and to grant summary disposition as to liability, based upon the open nature of the discrimination against osteopaths embodied in Defendant's policies. The Circuit Court, however, granted summary disposition for Defendant, finding that it could not be guilty of discrimination, based on the presence of osteopaths on the staff – as noted, this fact did not relate to the time in question – and on a line of pre-statutory authority from the Court of Appeals which prohibits the second-guessing of a private hospital's staffing decisions. Moreover, all but two of the osteopaths were credentialed in other departments where the discriminatory requirements were not applied.

An Appeal was timely taken. The Court of Appeals did not reach the questions presented for review, however, holding instead that the statute did not create a private right of action. (This issue had not been raised below.) Accordingly, the Court affirmed the Judgment of the Circuit Court by an Opinion dated May 4, 2004.

This Court granted Leave to Appeal on January 13, 2005.

ARGUMENT

STANDARD OF REVIEW

Grant or denial of a motion for summary disposition is reviewed *de novo*. *E g*, *Beaty* v *Hertzberg & Golden, P.C.*, 456 Mich 247, 571 NW2d 716 (1997); *Spiek* v *Department of Transportation*, 456 Mich 331, 572 NW2d 201 (1998).

I

THE STATUTE AT ISSUE, MCL 333.21513(e), PROHIBITS DISCRIMINATION AGAINST DOCTORS OF OSTEOPATHY IN THE GRANT OF HOSPITAL STAFF PRIVILEGES.

The statute at issue, MCL 333.21513(e), provided:[1]

> After December 31, 1989, [a licensed hospital] shall not discriminate because of race, religion, color, age, or sex in the operation of the hospital including employment, patient admission and care, room assignment, and professional or nonprofessional selection and training programs, and shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry.

This statute, with inconsequential differences, was enacted by PA 1989, No 27. According to the Legislative Analysis of HB 4403, dated March 21, 1989, this provision was needed because an earlier revision of the statutes on certificates of need had

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[1] Subsequent to the events at issue here, this provision was amended by PA 2002, No 125, to eliminate the reference to the effective date of the prohibition; the amendment has no effect on the question presented in this Appeal.

inadvertently omitted the antidiscrimination language previously appearing in MCL 333.22131(*l*). The new statute, however, did not merely re-enact the omitted provision but transferred the prohibition on discrimination from the licensure section of the public health code to a list of duties imposed on all hospitals, thus changing it from one regulatory consideration among many – the prior statute required the entity issuing a certificate of need to consider fourteen characteristics, among them the absence of discrimination – and made it a self-executing prohibition on discrimination.

Defendant argued in its response to Plaintiff's Application for Leave that the statute must be construed in such a way as not to violate the doctrine of judicial non-review. During the 1980's, starting with *Hoffman* v *Garden City Hospital*, 115 Mich App 773, 432 NW2d 820 (1982), the Court of Appeals, though never this Court, recognized a rule that the staffing decisions of a private hospital could not be made the basis for a cause of action; almost all of the reported cases preceded the effective date of the statute under consideration here. As a non-constitutional judicial doctrine, this rule must yield to an applicable statute. *E g*, *Bradley* v *Board of Education of the Saranac Community Schools*, 455 Mich 285, 565 NW2d 650 (1997). The Legislature clearly intended that hospitals *not* remain free to exclude osteopaths and podiatrists. And, indeed, the Court of Appeals in *Long* v *Chelsea Community Hospital*, 219 Mich App 578, 557 NW2d 157 (1996), recognized that the doctrine of non-review would not apply to a hospital acting in violation of state or federal law.

> Private hospitals do not have carte blanche to violate the public policy of our state as contained in its laws. Had

> plaintiff in this case asserted that defendants violated state or federal law, we may have chosen to review his claim. In this case, however, plaintiff did not assert a violation of civil rights or a violation of a state statute.

219 Mich App at 587, 557 NW2d at 162. The doctrine of non-review, accordingly, does not affect the result here. Defendant's Surgery Department clearly violated the statute by maintaining an express rule preferring the credentials of allopathic doctors to those of osteopaths.

II

THE STATUTE CREATES A RIGHT OF ACTION IN THAT IT GIVES DIRECT VICTIMS A RIGHT NOT TO BE DISCRIMINATED AGAINST BUT DOES NOT EXPRESSLY GRANT AN ADEQUATE REMEDY.

The Court of Appeals, however, held that MCL 333.21513(e) did not create a private right of action but could only be enforced by the regulatory and criminal sanctions available under the Public Health Code generally. This result goes against more than a century of authority in this Court holding that a victim of unlawful discrimination – whether or not that discrimination is barred under the common law – will be allowed a civil action for his or her damages in addition to whatever remedies are provided by the statute banning the discrimination.

It is true that there is a rule of statutory construction that a statute which creates a new right – one not existing at common law – can only be enforced by the remedy provided by the statute. As long ago as *Thurston* v *Prentiss*, 1 Mich 193 (1849), this Court declared:

> It is a well established principle of law, that where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued; and a party seeking the remedy is confined to that remedy, and that only.

1 Mich at 200. *See also*, *Pompey* v *General Motors Corp*, 385 Mich 537, 189 NW2d 243 (1971); *Monroe Beverage Co* v *Stroh Brewery Co*, 454 Mich 41, 559 NW2d 297 (1997). This assumes, however, that the statute creating the new right actually provides a remedy. The courts have accordingly developed a corollary principle that where the statute does not provide a remedy, or provides one plainly inadequate, the courts will infer that the Legislature intended the beneficiary of the new right to have a civil action for its enforcement. As this Court explained in a footnote in *Pompey* v *General Motors Corp*:

> There are two important qualifications to this rule of statutory construction: In the absence of a pre-existent common-law remedy, the statutory remedy is not deemed exclusive if such remedy is plainly inadequate, [citation omitted] or unless a contrary intent clearly appears.

385 Mich at 553, 189 NW2d at 251. The Court of Appeals repeated this principle more recently in *Mack* v *City of Detroit (On Remand)*, 254 Mich App 498, 658 NW2d 492 (2002), on which the Court of Appeals relied in the instant case.

> The Court [this Court in *Pompey*] acknowledged the general rule that, when new rights or duties that do not exist at common law are created by statute, the remedy provided for enforcement of that right by statute is exclusive. [Citation omitted.] It also recognized that the rule presumptively applied because there was no preexisting, common-law remedy for employment discrimination. [Citation omitted.]

> However, the Court noted that "the statutory remedy is not deemed exclusive if such remedy is plainly inadequate," and concluded that the plaintiff was not barred from bringing a civil suit to obtain full recovery for his damages. [Citation omitted.] Thus, cumulative remedies were permissible under the FEPA because the act created new rights but itself *did not provide for a civil cause of action to enforce those rights*. In fact, all the comparable statutes mentioned in the discussion in *Pompey* shared this deficiency. [Citation omitted.]
>
> In contrast, the remedies provided under the current Civil Rights Act are fully adequate. The act establishes the right to file a civil cause of action to recover damages and obtain injunctive relief, in addition to the right to initiate administrative proceedings before the Civil Rights Commission. [Citation omitted.] Therefore, the justification for allowing cumulative remedies for civil rights violations found in *Pompey* no longer exists, and the general rule with regard to the exclusivity of statutory remedies applies.

254 Mich App at 501-502, 658 NW2d at 494 (emphasis added). *See also*, *Pro-Staffers, Inc* v *Premier Mfg Support Services, Inc*, 252 Mich App 318, 651 NW2d 811 (2002).

It must be stressed that the question here is one of legislative intent, rather than judicial policy. As this Court explained in *Boscaglia* v *Michigan Bell Telephone Co*, 420 Mich 308, 362 NW2d 642 (1984):

> We read *Pompey* as holding that the Legislature intended a cumulative judicial remedy for an employer's violation of the FEPA. "[T]he question whether a statute creates a private right of action is ultimately 'one of [legislative] intent, not one of whether this Court thinks that is can improve upon the statutory scheme that [the Legislature] enacted into law * * *.'" [Citations omitted.] Thus the only difference in the legislative intent respecting a civil action for violations of the FEPA and the civil rights act is the specificity with which it was expressed. The source of the right to be free from employment discrimination under FEPA is statutory, just as it

is under the civil rights act.

420 Mich at 317-318, 362 NW2d at 646.

Accordingly, the Court must answer two questions with respect to a statute for which a civil remedy is to be implied. Did the Legislature create a new right? If so, it must be assumed that it intended for that right to be enforceable. And was the remedy provided in the statute "adequate"? If so, that remedy is exclusive. But if not, it must be inferred that the Legislature intended the holder of the new right to have an additional remedy, in the form of a normal civil suit, so that the right can be fully enforced. To hold otherwise would be to attribute to the Legislature the intent to perform a meaningless act.

A

THE STATUTE DIRECTLY CONFERS RIGHTS UPON VICTIMS OF PROHIBITED DISCRIMINATION.

The main type of statute in which the courts infer that the Legislature intended a remedy by civil suit has been one prohibiting discrimination. The leading case is *Pompey* v *General Motors Corp*, *supra*, where this Court held that a victim of employment discrimination in violation of the former Fair Employment Practices Act would be allowed to file suit.

> We recognize that the fact that there was no preexistent common-law remedy for racial discrimination in private employment is generally highly significant in determining the exclusiveness of the statutory remedy. The general rule, in which Michigan is aligned with a strong majority of

> jurisdictions, is that where a new right is created or a new duty imposed by statute, the remedy provided for the enforcement of that right by the statute for its violation and nonperformance is exclusive. [Citations omitted.] Correlatively, a statutory remedy for enforcement of a common-law right is deemed only cumulative.
>
> But courts have forged exceptions to these general rules when the statutory rights infringed were civil rights. Although there is some authority to the contrary most decisions have held that a person aggrieved by the violation of a civil rights statute is entitled to pursue a remedy which will effectively reimburse him for or relieve him from violation of the statute, notwithstanding the statute did not expressly give him such right or remedy.

385 Mich at 552-553, 189 NW2d at 251. *Accord*, *Ferguson* v *Gies*, 82 Mich 358, 46 NW 718 (1890); *Bolden* v *Grand Rapids Operating Corp*, 239 Mich 318, 214 NW 241 (1927); *St John* v *General Motors Corp*, 308 Mich 333, 13 NW2d 840 (1944).

Defendant argued in its response to Plaintiff's Application for Leave that the *Pompey* principle should be read narrowly and applied only to statutes protecting a few fundamental "civil rights." The short answer is that the statute at issue here *is* a "civil rights," or at least antidiscrimination, law. Modern civil rights laws are typically not limited to the suppression of such great historic injustices as racism, sexism, and religious intolerance but cast a much wider net. The Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*, covers not only discrimination on the basis of religion, race, color, national origin, and sex but also age, height, weight, familial status, and marital status. Many municipal ordinances and policies of educational bodies add sexual orientation; the University of Michigan adds Viet Nam-era veteran status. All that is required to justify a prohibition on discrimination is that the Legislature or other policy-making body

perceive a systematic unfairness towards an identifiable group of people. This Court in *Holmes* v *Haughton Elevator Co*, 404 Mich 36, 272 NW2d 550 (1978), refused to restrict the holding of *Pompey* to racial discrimination.

> There is nothing in our decision in *Pompey* which suggests that the holding is to be limited to the securing of one's civil right to be free from racial discrimination in private employment. The legislation which proscribed such racial discrimination, also proscribed discrimination on the basis of age, sex, color, religion, national origin or ancestry. MCL 423.301 *et seq.*; MSA 17.458(1) *et seq.* There is no reason to conclude that the Legislature, in drafting the FEPA, now part of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, intended that distinctive treatment be accorded violation of the specific civil right to be free from racial discrimination as opposed to violation of any of the other statutorily protected civil rights. The right to be free from racial discrimination and the right to be free from age discrimination in private employment are both statutory civil rights created by the FEPA and continued in [the] Civil Rights Act.

404 Mich at 42-43, 272 NW2d at 551. So while it is unquestionably true that discrimination against osteopaths does not compare in historical significance to that against African-Americans, it is nonetheless unlawful discrimination – expressly prohibited by a statute which also prohibits more usually banned forms of discrimination – and it must be inferred that the Legislature intended an adequate remedy.

But the narrow reading of *Pompey* urged by Defendant cannot be sustained. It must be remembered that the ultimate question is one of legislative intent. Racial discrimination is not subject to an implied private remedy because the courts have determined that the right to be free of such discrimination is of particular importance,

but because they assume that the Legislature would not create a right without an adequate remedy. And, indeed, the cases upon which this Court primarily relied in *Pompey*, *Ferguson* v *Gies*, *supra*, and *Bolden* v *Grand Rapids Operating Corp*, *supra*, did not draw the line at civil rights laws. Instead, those cases distinguished statutes designed for the protection of the public at large, and only incidentally protecting individuals, from those designed to protect individuals from harm by the targets of the statutes; in the former case no private right of action is recognized, while in the latter it is. As the Court explained in *Ferguson*:

> But it is claimed by the defendant's counsel that this statute gives no right of action for civil damages; that it is a penal statute; and that the right of the plaintiff under it is confined to a criminal prosecution. The general rule, however, is that where a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury or hurt is of the kind which the statute was intended to prevent[.]

82 Mich at 365, 46 NW 718.[2] The Court went into more detail in *Bolden*:

> This contention [that the public accommodations statute could only be enforced by criminal prosecution] finds support in decisions in which certain acts and ordinances containing penal provisions, but expressly conferring no right of private action, were considered. We think, however, that there is a clear distinction between the effect of such regulatory provisions and those provided for in the civil rights act. In the former, the duty enjoined is merely for the benefit of the public, and the penalty is imposed to secure its enforcement.

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[2] In *Ferguson*, the Court ultimately held that excluding a person from public accommodations on the basis of race violated Michigan common law; in both *Bolden* and *Pompey*, however, the Court rejected this as a ground for distinction from purely statutory rights.

* * *

> The rule is thus stated in 1 C. J. p. 957:
>
> "The true rule is said to be that the question should be determined by a construction of the provisions of the particular statute, and according to whether it appears that the duty imposed is merely for the benefit of the public, and the fine or penalty a means of enforcing his duty and punishing a breach thereof, or whether the duty imposed is also for the benefit of particular individuals or classes of individuals. If the case falls within the first class the public remedy by fine or penalty is exclusive, but if the case falls within the second class a private action may be maintained; particularly where the injured party is not entitled, or not exclusively entitled, to the penalty imposed."

239 Mich at 325-327, 214 NW 241.[3]

This distinction accounts for many of the cases in which the courts have declined to imply a private civil remedy. In *Monroe Beverage Co, Inc* v *Stroh Brewery Co*, *supra*, this Court held that provisions of the Liquor Control Act regulating the relations between

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[3] The phrase "civil rights," furthermore, has been defined much more broadly than the conventional reference to the suppression of discrimination. The authors of 14 *CJS*, "Civil Rights," § 2(a) (1991), explain:

> A civil right is a right that is accorded to every member of a distinct community or nation, one which pertains to a person by virtue of his citizenship in a state or community; the term "civil rights" is defined to mean those rights which the law gives to a person.
>
> In terms of enforceability, civil rights are such rights as the law will enforce, and a civil right is defined as a legally enforceable claim of one person against another; a right which the municipal law will enforce at the instance of a private individual for the purpose of securing to him the enjoyment of his means of happiness.

This definition is much more in line with the principle recognized in *Ferguson* and *Bolden*, and continued in *Pompey*, than the narrow definition proposed by Defendant.

suppliers and wholesalers, MCL 436.30b, was limited to parties in privity of contract; the plaintiff there was not and so was not intended to be protected. Similarly, in *Lamphere Schools* v *Lamphere Federation of Teachers*, 400 Mich 104, 252 NW2d 818 (1977), the Court held that the Public Employment Relations Act, MCL 423.201 *et seq*, provided for the suppression of strikes by public employees without creating a cause of action for the public bodies struck; it was the rights of the general public, rather than specific governmental entities, which were meant to be protected. In *BPS Clinical Laboratories* v *Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 552 NW2d 919 (1996), *cert den*, 522 US 1153, 118 S Ct 1178, 140 L Ed 2d 187 (1998), and *Genesis Center PLC* v *Blue Cross & Blue Shield of Michigan*, 243 Mich App 692, 625 NW2d 37 (2000), the Court of Appeals held that the Non-Profit Health Care Corporation Reform Act, MCL 550.1101 *et seq*, which expressly provided a private cause of action to subscribers, would not be implied to give a right of action to providers who wanted to be included in the Blue Cross system; again, providers were not the intended beneficiaries of the Act. *See also*, *Bell* v *League Life Ins Co*, 149 Mich App 481, 387 NW2d 154 (1986), *lv den*, 425 Mich 870 (1986)(Uniform Trade Practices Act, MCL 500.2001 *et seq*, can only be enforced by insurance commissioner)[4]; *IBEW, Local No 58* v *McNulty*, 214 Mich App 437, 543 NW2d 25 (1995)(Prevailing Wage Act, MCL 408.551 *et seq*); *General Aviation, Inc* v *Capital Region Airport Authority*, 224 Mich App 710, 569 NW2d 883 (1997), *lv den*, 458 Mich 864, 582 NW2d 835 (1998)(provision in Aeronautics Code,

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[4] This Court held in *Smith* v *Globe Life Ins Co*, 460 Mich 446, 597 NW2d 28 (1999), however, held that the same conduct may be reached by a suit under the Michigan Consumer Protection Act, MCL 445.901 *et seq*.

MCL 259.1 *et seq*, requiring uniformity of fees); *Lane* v *Kindercare Learning Centers, Inc*, 231 Mich App 689, 588 NW2d 715 (1998)(Child Care Organizations Act, MCL 722.111 *et seq*).

The distinction between general laws, incidentally benefitting particular persons, and laws directly benefitting individuals can be hard to draw in particular cases – Plaintiff does not vouch for the correctness of all the Court of Appeals decisions cited – but it is clear that the statute in question here falls within the class for which the courts should infer that the Legislature intended an adequate remedy. Although the Public Health Code as a whole is arguably directed at protecting the general public, the enactment in question was a stand-alone, self-executing prohibition of certain acts directed against particular individuals and classes of individuals. Exclusion of an osteopath or podiatrist – or a member of a more traditionally protected group – is an act with an identifiable victim. The public is presumably benefitted by having access to qualified health care professionals, without arbitrary and unjustified limitations, but here it is the *public* benefit which is "incidental" to a prohibition of wrongful conduct against individuals. So even if the Court is not disposed to see this statute as a "civil rights act," it still comes within the longstanding rule about implying rights of action where statutes are directed at interpersonal wrongs – especially unlawful discrimination.

B

THE STATUTE DOES NOT EXPRESSLY PROVIDE AN ADEQUATE REMEDY FOR PROHIBITED DISCRIMINATION.

The question now becomes whether the statute provides a sufficient remedy that

it may be inferred that the Legislature intended it to be exclusive. The easiest problem is where a statute expressly excludes other remedies. *E g*, *Detroit Area Agency on Aging* v *Office of Services to the Aging*, 210 Mich App 708, 534 NW2d 229 (1995), *lv den*, 451 Mich 897, 549 NW2d 577 (1996). Only slightly more difficult are statutes which provide their beneficiaries with a prescribed alternative remedy, albeit not by a regular civil suit; to rule such a remedy "inadequate," a court would have to find that it was not only insufficient, but that it was so much so that the Legislature must not have intended people to have to use it. For example, this Court and the Court of Appeals have repeatedly held that the Whistleblowers' Protection Act, MCL 15.361 *et seq*, can only be enforced by a suit under that Act. *Dudewicz* v *Norris-Schmid, Inc*, 443 Mich 68, 503 NW2d 645 (1993); *Covell* v *Spengler*, 141 Mich App 76, 366 NW2d 76 (1985), *lv den*; *Shuttleworth* v *Riverside Osteopathic Hospital*, 191 Mich App 25, 477 NW2d 453 (1991), *lv den*, 440 Mich 887, 487 NW2d 468 (1992); *Driver* v *Hanley*, 207 Mich App 13, 523 NW2d 815 (1994). Similarly, in *Pro-Staffers, Inc* v *Premier Mfg Support Services, Inc*, *supra*, the Court of Appeals applied the "adequacy of remedy" test to hold that subrogation suits in workers' comp had to be pursued under the Workers Disability Compensation Act, MCL 418.101 *et seq*.

> We hold that because § 827 provides a detailed procedure that, if utilized by the employer or carrier, will result in full reimbursement of the benefits paid to the injured employee, no additional remedies can be inferred. . . . Thus, because the Legislature has created a remedy for employers and carriers to recoup the workers' compensation benefits paid to injured employees, and because we do not find this remedy to be "plainly inadequate," the remedy provided in the subrogation provision of MCL 418.827 is exclusive.

252 Mich App at 327, 651 NW2d at 816. *See also*, *Ohlsen* v *DST Industries, Inc*, 111 Mich App 580, 314 NW2d 699 (1981), *lv den* (Michigan Occupational Safety & Health Act, MCL 408.1001 *et seq*, provides procedure, which is exclusive); *Dryden* v *Coulon*, 145 Mich App 610, 378 NW2d 767 (1985)(MCL 552.526 provides grievance procedure, which grievants "shall utilize," against the Friend of the Court).

In all of these cases, it was clear that the Legislature had given thought to how any rights conferred by the statutory scheme were to be enforced – assuming that there were rights given, which was the subject of the last section of this Brief – and the statute told the beneficiaries of such rights how to proceed.

In this case, the Court of Appeals suggested that hospitals violating the antidiscrimination provisions were subject to loss or suspension of license under MCL 333.20165(1)(b), an administrative fine under MCL 333.20176, an injunction, which may be sought only at the instance of the Director of the Department of Community Health, under MCL 333.20177, or a criminal prosecution under MCL 333.20199. It should be noted that none of these remedies is available of right to a victim of discrimination, nor does any of them serve to make such a victim whole. Some of them can also be described as "overkill." To suggest that the administrative authorities might revoke the license of the only hospital serving a community because one of the hospital's employees had practiced discrimination against a single individual is, frankly, absurd. Nor is it likely that the Legislature intended discrimination against osteopaths in hospital staffing decisions to be criminally punished when other, arguably more significant, forms of discrimination are not. And injunctions are only useful against

threatened future harm, not discrete acts of discrimination which have already happened.

It should also be kept in mind that the proposed exclusive remedies are not directed at violations of the provision in question. Unlike the cases cited above, where a course of action for wronged persons is set out in the statute, it is suggested here that victims of discrimination resort to the general remedies provided for all violations of the Public Health Code, one of the longest and most complex portions of the Compiled Laws. That Code is enforced by the Department of Community Health, presumably a body with expertise in health care issues, but no particular familiarity with antidiscrimination enforcement. Furthermore, with no remedy available of right to the victims of discrimination, complaints of violation may not be at the top of the administrative agenda.

The only rational course is for this Court to deal with the statute in question as it has always dealt with antidiscrimination statutes and imply a private cause of action where the Legislature has neglected to do so expressly.

III

ADDITIONAL CANONS OF CONSTRUCTION INDICATE THAT A CIVIL REMEDY WAS IMPLICITLY INTENDED.

The legislative history, furthermore, supports this conclusion. It is presumed that where the Legislature changes the wording of a statute, it intends a difference in meaning. As this Court declared in *Sam* v *Balardo*, 411 Mich 405, 308 NW2d 142

(1981):

> This is consistent with the rule of statutory construction stated in 1A Sutherland, Statutory Construction (4th ed), § 22.30, p 178, that "any material change in the language of the original act is presumed to indicate a change in legal rights". As a rule, courts look to the circumstances surrounding the enactment to determine if the presumption can be fairly supported.

411 Mich at 431, 308 NW2d at 153. *See also, Capitol Savings & Loan Co* v *Case*, 285 Mich 679, 281 NW 402 (1938); *Deschaine* v *St Germain*, 256 Mich App 665, 671 NW2d 79 (2003). As set forth above, the Legislature deliberately took the disapproval of discrimination out of that part of the Code which governed the regulatory determination of whether a hospital should be allowed to operate and turned it into a direct prohibition. Nondiscrimination is no longer merely one regulatory consideration among many – perhaps to be balanced against other considerations – but is now an absolute duty of hospitals. The Legislature clearly meant for discrimination to be taken more seriously under the new regime. The decision of the Court of Appeals, however, puts it back into the regulatory arena, to be suppressed or not depending on the regulatory agency's evaluation of the overall situation. This reverses the change the Legislature intended.

It is furthermore presumed that the Legislature is familiar with the rules of statutory construction, including how similar problems have been dealt with elsewhere. *Nation* v *WDE Electric Co*, 454 Mich 489, 563 NW2d 233 (1997). The Legislature presumably knew that under prior decisions of this Court, such as *Pompey* v *General Motors Corp*, *supra*, a remedy is implied in antidiscrimination laws, without the need to

declare one expressly.[5]

Nor did the Legislature expressly prohibit private actions. The Circuit Court held – this was one of the questions which the Court of Appeals did not reach – that hospitals were entitled to immunity from suit under MCL 331.531(3). Plaintiff conclusively demonstrated in the Court of Appeals, however, that this immunity applies only to "review entities," MCL 331.531(2), individuals and groups actually participating in peer reviews, and not to the hospitals at which those reviews take place. By drawing the immunity statute as it did, the Legislature clearly left the door open to suits against hospitals for wrongful practices in the grant or denial of staff privileges.[6]

* * *

In the end, this should not have been a difficult case. The statute unequivocally requires hospitals to accord osteopaths and podiatrists equality with medical doctors in the grant and denial of staff privileges. This Defendant's Surgery Department maintained an express policy of preferring the credentials of medical doctors to those from other schools. The Plaintiff fell victim to this policy. In all previous cases, the appellate courts of this state have held that violations of statutory prohibitions on

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[5] This is not to suggest that the express provision of a civil suit under the Elliott-Larsen Act, MCL 37.2801, is surplusage. That section serves to vest jurisdiction of actions under the Act in the Circuit Courts, as opposed to the Court of Claims, *Neal* v *Department of Corrections*, 232 Mich App 730, 592 NW2d 370 (1998), *lv den*, or the District Courts, *Baxter* v *Gates Rubber Co*, 171 Mich App 588, 431 NW2d 181 (1988).

[6] There are significant common-law protections for hospitals in this matter under *Hoffman* v *Garden City Hospital*, *supra*, and its progeny.

discrimination can be enforced by a civil action, even where the statute is silent or provides another remedy. The Court of Appeals, however, has broken with this tradition and closed the courts to those whom the Legislature sought to protect. The result is likely to be a continuation of the professional prejudice which the law is aimed to suppress.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellant LOWELL FISHER, DO, respectfully prays that this Honorable Court REVERSE the Order of the Court of Appeals and REMAND for further consideration of his Appeal in that Court.

Respectfully submitted,

GREEN, GREEN & ADAMS, P.C.

Dated: March 9, 2005 By: _____

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